Top Gun, Inc. and Rustcorp Company, a Single Employer *and* Jesse East. Case 9–CA–29902

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 30, 1993, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found that on August 28, 1992, the Respondent discharged the Charging Party, Jesse East, from his security guard job in violation of Section 8(a)(3) and (1) of the Act. In so finding, the judge noted that, although East's brother Kenny had been discharged for sleeping on the job at the Top Gun mine about a year earlier, East testified without contradiction that ''they turned around and hired him right back'' at the Nevarro mine. Although William Skewes Jr. (Skewes) is the sole owner of Top Gun, Inc. and Rustcorp Company, and his father is the owner of Nevarro, the judge observed that the operation of Nevarro was closely tied in to the operation of other mines owned by Skewes, and that Rustcorp furnished guards to Nevarro as well as to Top Gun. The judge thus found that Kenny East's ''prompt reassignment to Nevarro indicates that what Skewes really did was suspend him for a short while.''

In exceptions, the Respondent argues that the record does not support the judge's finding that Skewes simply reassigned Kenny East to Nevarro. We find no merit to that argument. In addition to the factors cited by the judge, we note that a former employee at the Nevarro mine, Michael Stark, testified that Kenny East came to work at Nevarro as a guard.[2] Kenneth Bolton, the superintendent at the Top Gun mine, testified that he fired Kenny East about a year before he terminated Jesse East—that is, around August 1991. In April 1991, according to Skewes' testimony, all the guards formerly employed by the mining companies owned by Skewes and his father (including those at the Top Gun and Nevarro mines) were transferred to the Rustcorp payroll. It thus appears that when Kenny East was hired as a guard at Nevarro, he must have been hired by Rustcorp, because the mining companies had ceased to hire guards directly several months before. Accordingly, we find that the judge aptly characterized Kenny East's rehiring at Nevarro as, in fact, a reassignment by Skewes, and his ''discharge'' from his job at Top Gun as merely a brief suspension. For that reason, as well as those relied on by the judge, we affirm the judge's finding that Jesse East was unlawfully discharged.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Top Gun, Inc. and Rustcorp Company, a Single Employer, Elbert and Thorpe, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We correct the following inadvertent, and inconsequential, errors in the judge's decision: (1) the correct citation to *Wilson Trophy Co.* is 307 (not 309) NLRB 509 (1992); (2) Gary Scott was called as a witness by the General Counsel, not by the Respondent; (3) the witness who testified that the seriousness of sleeping on the job had not been driven home to supervisors was William Skewes, not Kenneth Bolton.

In adopting the judge's finding that Top Gun, Inc. and Rustcorp Company are a single employer, we do not rely on his statement that, because Skewes owns both Top Gun and Rustcorp, Rustcorp's guards at the Top Gun mine are Skewes' responsibility to manage. Nor do we rely on his citation to *Milford Services*, 294 NLRB 684 (1989), which we find to be inapposite to the facts of this case.

[2] We are aware that the judge discredited a different portion of Stark's testimony, partly on demeanor grounds and partly because of Stark's relationship (half-brother) to Jesse East. We do not think, however, that the judge meant to discredit Stark entirely, for several reasons. First, he explicitly discredited only a discrete part of Stark's testimony; indeed, he appeared to credit Stark's description of a mine page phone. (''It'll wake you up.'') Second, he plainly found the discredited testimony itself improbable. Finally, the discredited testimony was contradicted by Gale Whitt, who was called by the Respondent as a rebuttal witness, and whose demeanor impressed the judge favorably. By contrast, there is nothing improbable about Stark's claim that Kenny East was hired as a guard at Nevarro, especially given the judge's finding that the Respondent took a nonchalant attitude toward guards sleeping on the job until it learned that Jesse East was about to file a grievance. Also, Skewes was present and testified at the hearing, but was not called on to rebut Stark's testimony that Kenny East had been hired as a guard at Nevarro. As Skewes obviously would have known whether or not Kenny East had been hired as a guard (and thus as an employee of Rustcorp, which Skewes owns), we infer from his failure to testify on that subject that Stark's testimony was accurate.

[3] However, we find it unnecessary to pass on the judge's suggestion that an employer who sets out to trap an employee may not be entitled to assert the affirmative defense that the employee would have been discharged even in the absence of his protected concerted activities. Cf. *Wright Line*, 251 NLRB 1083 (1980).

Vyrone A. Cravanas, Esq., for the General Counsel.
Albert F. Sebok, Esq. (Jackson & Kelly), of Charleston, West Virginia, for the Respondent.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was heard in Beckley, West Virginia, on March 10, 1993.[1] The amended complaint principally presents the issues of whether the two employers named in the complaint constitute a ''single integrated business enterprise and a single employer'' and whether Jesse East, the Charging Party, was discharged on August 28, 1992, because he ''assisted the Union and engaged in concerted activities.''

Briefs were received from the General Counsel and the Respondent on or about April 30, 1993. Having reviewed the entire record,[2] the briefs, and my recollection of the demeanor of the witnesses, I make the following findings of fact,[3] conclusions of law,[4] and recommendations.

I. THE SINGLE EMPLOYER ISSUE

As indicated above, the complaint alleges that Top Gun, Inc. and Rustcorp Company constitute a single employer. As both parties point out, the Board and courts principally examine four factors in making this judgment: common ownership, common management, interrelation of operations, and centralized control of labor relations. The latter three factors are stressed, especially centralized control of labor relations. Single employer status depends on all the circumstances, and it is often characterized by the absence of the arm's-length relationship usually found between unrelated companies. *Truck & Dock Services*, 272 NLRB 592 fn. 2 (1984).

Rustcorp was formed as a corporation in 1986, and Top Gun was incorporated in 1990. Both corporations have the same business address. William G. Skewes Jr. owns all the shares of both corporations. The charters of both corporations state that they have been created for the purpose of engaging in coal mining. However, while Top Gun operates a deep coal mine in Elbert, West Virginia, Skewes testified that Rustcorp engages only in (1) performing construction around the surface areas of underground coal mines, and (2) providing security guards and ''outside communications'' people to mining companies.[5]

Skewes is president of Top Gun (and maybe the secretary and treasurer), and his mine superintendent at Top Gun, Kenneth Bolton, is vice president of that corporation. Skewes is president and secretary of Rustcorp, and his father is treasurer. Skewes and Bolton constitute the board of directors of Top Gun, and Skewes and his father make up Rustcorp's board. Neither corporation holds formal board meetings; corporate decisions are made by Skewes alone.

Skewes owns ''controlling interest'' in three other deep mines within a 9-mile radius of the Top Gun mine, named Southern Edge, Murphy's Branch, and Tipple Mine.[6] There is also a mine called Nevarro, which Skewes testified is owned by his father, but which seems to be linked in some informal way to Skewes' businesses.

According to Skewes, his four mining operations use to directly employ guards until April 1991, when he transferred the guards (then 10 of them, which includes 2 at Nevarro) ''out of those mining companies'' and onto the payroll of Rustcorp.[7] Rustcorp has performed construction work for the mines which Skewes controls and also now provides security guards to those mines. Skewes described Rustcorp's construction work as involving a ''very small crew,'' which usually does one job at a time. The only other construction work identified at the hearing as having been performed by Rustcorp for mines not owned by Skewes was at a company called Benefactors, of which Skewes owns 40 percent, and three other mines.

Although each of Skewes' mines has an office at the minesite, and maintains some safety, disciplinary, and absenteeism records at those offices, they employ no clerical help there, and the basic recordkeeping, insurance, and benefits administration for both Rustcorp, Skewes' four mines, and Nevarro, is done in the Rustcorp office at Thorpe, West Virginia, about 5 miles from the Top Gun mine. There, Gail Whitt, the office manager, with two assistants, maintains basic personnel records and performs other services for the miners at the different mines and for the Rustcorp employees, and sends paychecks for the miners and the Rustcorp guards to the mines for transmittal to the employees. The mines pay a fee to Rustcorp for performance of these services. Rustcorp and Skewes' four mines (and apparently Nevarro) have the same accountant, a decision made by Skewes.

Certain equipment, such as an end-loader and a bulldozer, which is leased by Top Gun, is used by Rustcorp employees at the Top Gun site. Decisions relative to those Rustcorp employees working at Top Gun, such as discharge (but not hire), overtime, time off, and vacations, are made by Top Gun mine superintendent Bolton. According to Skewes, the Rustcorp guards are Bolton's ''employees, really. He has to manage them. . . . [T]hey are his responsibility.'' If a Rustcorp guard has a ''problem,'' he would see Bolton.

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[1] The charge was filed on September 3, 1992, and amended on October 9, 1992. On October 16, the Regional Director issued a complaint, and on February 23, 1993, the complaint was amended.

[2] The exhibits received from the reporting company failed to include the original formal documents, with the exception of the ''Index and Description'' thereof, and the reporting company has been unable to locate the remainder of this exhibit. On my request, counsel for the General Counsel has supplied copies of the missing documents, which have been placed in the exhibits file.

[3] Certain errors in the transcript have been noted and corrected.

[4] There is no dispute about the appropriateness of the Board's assertion of jurisdiction over Respondent Top Gun or about the status of United Mine Workers of America, AFL–CIO, as a labor organization within the meaning of the Act.

[5] An ''outside communications'' person is there to respond to any alarm which may be raised by underground miners in the event of an emergency, and he may also be called on to perform minor tasks on the surface. A security guard is usually also an outside communications person; when he is more properly called a security guard, it is because there are no miners working the mine at that time. Parenthetically, the mystery of why the mine is called ''Top Gun'' while the security guard service is named ''Rustcorp'' was not solved at this hearing.

[6] The other mines are also separately incorporated.

[7] This move was apparently caused by a ruling from the State that workmen's compensation rates for guards employed by a mining company must be the same as for the miners, while the same guards working for a nonmining corporation would require less expensive coverage.

Skewes testified that a Thomas Woolwine of Personnel Management Consultants, Princeton, West Virginia, was hired by him to ''handle . . . labor relations for Rustcorp and for Top Gun.'' A position paper prepared by Woolwine in this proceeding states that ''Rustcorp and Top Gun are commonly owned and controlled corporations by W. G. Skewes, Jr.''

As earlier set out, in assessing a ''single employer'' claim, the Board principally weighs the factors of common ownership, common management, interrelation of operations, and centralized control of labor relations; the first factor is considered the least significant, the fourth is deemed the most important. To my knowledge, the Board has never explained precisely how these factors are weighed against one another or together, nor what the underlying policies are that would provide guidance in undertaking the task. Single employer status may be asserted for different reasons. The most prominent would seem to be the assertion of jurisdiction over an immediate respondent and a related enterprise when, under the Board's discretionary guidelines, the business of the named respondent would not separately qualify for jurisdictional purposes. A second major purpose for alleging single employer status is to make both enterprises liable for any remedial order rendered. Does the difference in purpose mandate a different analysis of the factors? Since the cases do not indicate any such mandate, but seem rather to apply an unstructured approach, and since I have no particularly insightful theories to offer, I shall proceed the best that I can.

Common ownership is present here; Skewes wholly owns Top Gun and Rustcorp. Common management is present in the sense that Skewes dictates corporate policy for both companies, without the formality of action by the nominal boards of directors. Indeed, the corporations are, if Skewes so desires, simply his compliant creatures: when he learned that it was cheaper to have the guards on the payroll of Rustcorp rather than their being employees of Top Gun and the other mines, he moved them accordingly. He could move them back just as easily.

In addition, Top Gun Superintendent Bolton both supervises Top Gun miners and Rustcorp guards; as to the latter, he makes such decisions as whether they work overtime, whether they can take time off, and when they take vacations.

As for interrelation of operations, there is such a relationship, on two levels. One is the major bookkeeping and administrative work, performed for all of Skewes' corporations at the same central site by the same clerical employees. The other, more functional, relationship can be found in the cheek-by-jowl employment of Rustcorp guards and the miners whose work is, while different, closely related. There is, moreover, use by Rustcorp employees at Top Gun of equipment leased by Top Gun.

Finally, the factor of the extent of centralized control of labor relations must be examined. As earlier set out, Skewes testified that the guards furnished by Rustcorp at Top Gun are Mine Superintendent Bolton's ''employees really.'' But, because Skewes owns both Rustcorp and Top Gun, the Rustcorp guards at the Top Gun mine are also Skewes' ''responsibility'' to ''manage.'' Because Woolwine was admittedly hired by Skewes to ''handle . . . labor relations for Rustcorp and for Top Gun,'' centralized control of labor relations is apparent.

It thus appears that an affirmative response is appropriate to all four of the questions which the Board asks about an alleged single employer relationship. There sticks out in this case, however, the fact that Rustcorp assertedly engages in operations different from mining—the construction business and the provision of security guards.[8] The Board has held, however, that one enterprise may be found to constitute a single employer with another entity which also engages in other diverse and unrelated functions. *Milford Services*, 294 NLRB 684, 689 (1989); see also *Sogard Tool Co.*, 285 NLRB 1044, 1047 (1987). Given the obvious lack of arm's-length relationship between Rustcorp and Top Gun—as especially exemplified by the simple bookkeeping entries which converted Top Gun employees into Rustcorp employees—it would seem clear enough that, under the Board's test, the two corporations do constitute a single employer as alleged.

II. THE DISCHARGE OF JESSE EAST

Jesse East was hired by Skewes most probably in the second quarter of 1990 to serve as a guard at the Top Gun mine, whose miners are represented by the United Mine Workers of America. At all times material to this case, Top Gun and UMWA were bound by the National Bituminous Coal Wage Agreement (NBCWA) in effect from 1988 to 1993. When East was hired, the Top Gun site was being readied for operation, and East served principally as a night watchman to guard the equipment. For the first few months, he worked from 3 p.m. until 7 a.m. on Monday through Thursday, and on Friday he would start at 3 p.m. and stay at the mine until 7 a.m. on Monday. When another guard was hired in the summer of 1990, East's hours changed so that he worked from 11 p.m. to 7 a.m. and only every other weekend.

At the end of the summer of 1990, Superintendent Bolton assertedly assigned East some new duties: ''we loaded scoops, we got supplies ready from them to go into the mines, loaded rock dust.''[9] Superintendent Bolton disputed East's testimony. He admitted that as the mine went to three shifts, East's job changed somewhat, but only in that he loaded supplies and minor duties of that nature (consuming perhaps an hour of his time), in addition to his preexisting work of cleaning the shop and bathroom and spraying the concrete road.

As will be seen, I question the veracity of both Bolton and East, and I have no particular reason to choose the testimony of one over the other here, although I suspect that East may be more accurate.

According to East, around the fall of 1990, Bolton ''told me that I had a job in the mines,'' and sent him to take a physical and a class in Sophia, West Virginia, which would qualify him for a miner's certificate, or ''ADR card.'' After he had accomplished these missions, East began working underground on the 8-hour second shift. He testified as follows about what subsequently occurred:

[8] The record is silent on the factual questions of the extent to which Rustcorp performs these functions for mines independent of Skewes and his father, except as earlier noted.

[9] East testified that the other guard did not perform such work, but did not explain his use of the word ''we.''

> I worked second shift about—I worked altogether nine days. I worked five days on second shift and then he brought me out on day shift one morning and me and him shoveled belt. One day and then the next day I come out—I broke my little finger.[10]

Bolton told a different story. He testified that East had asked him repeatedly for the opportunity to work underground and finally, at a time when Bolton had four injured workers in 1991, he agreed to let East work in the mine, but just until he ''got my regular underground workers back.''[11] According to Bolton, he brought East out of the mine after 7 or 8 days, and reinstated him as a security guard, when ''some'' of the injured miners returned. According to Bolton, the injury occurred when, after East had returned to his security position, Bolton took East with him into the mine ''for an hour'' to perform a specific job on some conveyor belting. Bolton conceded that East had been sent for a physical examination, but he thought it was ''after that,'' i.e., after East had returned to surface work. Bolton said that ''we had a salary meeting with Southern Safety and we told them that our guards were moving man-trips and scoops and putting them on charge. He advised us to make every one of them take a physical and get an ADR card so we would be covered if any one of them got injured moving any of the man-trips or anything.''[12]

Although this subject is not material, the conflict raises a credibility issue. Presumably there was documentation about the physical examination and the ADR testing available to both sides, but neither produced any. East's testimony, quoted earlier, is somewhat ambiguous. However, it seems most likely to me that East would not have been assigned underground work without *first* having the examination and taking the ADR class and test. Furthermore, the record shows that in a Report of Occupational Injury filed with the State by East and signed by Office Manager Gale Whitt on February 21, 1992, East listed his occupation as ''Miner,'' Top Gun was shown as the employer, and Whitt showed East's daily rate of pay at the time of the injury as $135.76, which was miner's scale.[13]

Based on the foregoing, I conclude that Bolton was not telling the truth, either about the reason for or purpose of the ADR training or about East's assigned duties at the time of East's injury.[14]

East testified that he returned to work about 5 days after his injury and went back to a $300-per-week salary, with his pay being issued on Rustcorp checks. He testified, without contradiction, that when a miner is injured and cannot return to work in the mine, he is usually brought back ''to work light-duty'' outside the mine, and that is what he thought was being done with him. According to the Report of Occupational Injury, he returned on February 13, 1991. East testified that when he returned to work, he was not required to fill out an application for Rustcorp and had no other contact with that firm until he received a Rustcorp paycheck.

After returning to work, East had several operations on his finger, eventually resulting, as noted, in amputation. When he was not out on an injury-related absence, he was working the 11 p.m. to 7 a.m. shift and every other weekend as a guard/outside communications man (guard), but also, he says, doing ''a lot more'' of nonguard work (''Loading the scoops with timbers, bending bolts, I moved some coal for them off the unloader for them to run dirty coal at night, greased the scoops, greased the belts'') which he considered to be ''union-type'' work under the NBCWA. However, for a lengthy period of time—according to East, probably ''a year, year and a half''—he did nothing about raising his pay from the $300 or $350 that he was receiving, other than once or twice asking Bolton (who both told him ''no'' and also said to speak to Skewes) about going back in the mine. Not long before he was discharged, however, East spoke to Bolton about the matter again, and Bolton told him to ask Skewes. When he met with Skewes, East asked to be put in the mines ''or could he give me a raise with my pay.'' According to East's uncontroverted testimony, Skewes said that if he did not like his pay, he ''could get the hell off the hill.''[15]

East testified that after that reasoned response, having just gotten off duty, he immediately went to see Roger Yates, a union district executive board member located in Welch, West Virginia. He discussed his situation with Yates and Yates told him that he ''had a good case.'' The two men filled out a grievance on a standard UMWA form, and Yates said, according to East, that he would mail a typed copy to East, and he should present it to Bolton. Yates testified that he had East sign and date the grievance form before he left the office, which was his practice. The date appearing on the form is ''8–27–92,'' and it appears to have been done by a different writing instrument from East's signature. Unlike East, Yates said that East left the office with the grievance. I am inclined to accept East's detailed recollection that he received the grievance in the mail.

The typed grievance reads as follows:

> Issue #1: I am requesting my proper rate of pay for each day that I work. I was injured on the job underground in the mine doing classified work for this employer. Management has junior employees to me performing classified work that I have the ability to perform. I am asking pay for each day that I am denied the right to work. I feel my rights have been violated under Article I, Article XVII, Sections (a) and (b) [''Seniority''] of the NBCWA of 1988. I also wish to use any other Articles or Sections that may support my claim. Issue #2: I also feel that I am being discriminated against because of my on-the-job injury and therefore was taken out of my classified work assign-

[10] In fact, East's finger eventually had to be amputated, after several operations.

[11] East denied that Bolton told him the work was temporary.

[12] This tends to corroborate East's testimony about the extra work he performed as a guard.

[13] As a guard, East earned $300–$350 per week. In one item of the information to be filled out by the employer on the Report of Occupational Injury, the question is asked whether the employer disagrees with any of the information given by East. The ''Yes'' box is marked, and the words ''See Supt. Letter (Enclosed)'' appear. However, no such document is attached to the exhibit in evidence.

[14] I find ambiguous East's testimony that on the day he was injured Bolton ''had me outside'' and ''kind of got me and take me underground at that time.''

[15] Skewes said that East had asked him a few times to work in the mines and was told he could not; Skewes could not recall when these requests were made.

ments. I feel my rights have been violated under Article XXV [''Discrimination Prohibited''].

As can be seen, the written claim is clear: it asserts that East was doing ''classified'' (bargaining unit) work and has been denied the right to assert his unit seniority to return to it; and that he has been discriminatorily denied classified work because of his injury. At the hearing, however, both East and Yates contended that what they were really complaining about was Respondent's failure to pay him for his classified ''light duty'' work (although Yates frequently equivocated on the matter; compare Tr. 147, LL. 19–20, with Tr. 147–148, LL. 25–2). In my judgment, Yates had simply forgotten the nature of the grievance and was bluffing it out at hearing.[16]

A critical issue now arises. Yates testified that later on August 27, he made contact with Skewes and told him ''so this won't come as no surprise to you, a gentleman by the name of Jesse East just left the office and he's filing a grievance'' claiming he should be in the bargaining unit. Skewes replied that he had hired East as a watchman, and Yates assertedly responded (again contrary to the plain meaning of the grievance), ''He tells me that he's been doing what we determine as classified work in the coal industry.'' Yates further told Skewes that East had mentioned two other employees, Steve Trent and Ronald Padgett, who reportedly were doing bargaining unit work and not paying dues. Skewes testified that Yates gave the impression that East's complaint was totally unfounded (''[I]t was like, what's this guy doing down here? He's not in the Union up there.'')

I doubt that, having drawn up the August 27 grievance (and then, on September 1, drafting another grievance concerning East's August 28 discharge), Yates intended to, or did, give Skewes any such impression. The critical issue referred to above is whether, as both Skewes and Bolton denied, the former said anything to the latter, prior to East's termination, about Yates' reference to East in his conversation with Skewes and, more specifically, whether Skewes then told Bolton that Yates had said that East was filing a grievance.

Skewes was a likeable witness, and his willingness to concede that Yates had mentioned East in their telephone conversation would seem, at first glance, to boost his credibility. However, Skewes had little choice about making such a concession, because labor consultant Woolwine's September 30, 1992 position statement to the Board admits that Skewes ''did have a conversation with United Mine Workers Representative, Roger Yates, on August 25 [sic], 1992. The conversation was initiated by Mr. Yates *who requested to know the job duties of Mr. East*, but there was no conversation or presentation of a grievance until after Mr. East had been discharged'' (emphasis added). It will be seen that Woolwine's description of the Yates-Skewes conversation is considerably more serious and businesslike than the version given by Skewes at the hearing.

[16] Although Yates testified that there was a ''substantial'' difference in pay between the amount paid to in-mine employees and to surface bargaining unit employees, the General Counsel cites no relevant contract provision, and I can find none, which clearly establishes the pay of a ''light-duty'' unit employee. However, the NBCWA does refer (R. Exh. 6, p. 61) to a ''light-duty classified job'' for employees recovering from disabilities.

Although, as indicated, there was nothing about Skewes' demeanor to suggest that he was not telling the truth, I believe that the totality of the evidence points to a finding that Skewes did inform Bolton that Yates had called about a grievance being filed by East. In so concluding, although, as will be discussed, I find East to have lied at the hearing, I rely on the testimony of East that, after he visited Yates, a miner named Kasky and Third-Shift Foreman Hagy told East that they had heard he was going to file a grievance. Hagy was not called by Respondent to deny this testimony, and no representation was made that he was unavailable. I can only infer from Hagy's nonappearance that Hagy would have testified that he did indicate on August 27 knowledge of East's intent to file a grievance, knowledge which presumably would have been conveyed to him by someone in management.

I am also influenced by the logic of the situation. If, as Skewes testified, he was ''concerned'' about the alleged nonpayment of dues for Padgett and Trent, would he not have contacted Bolton about Yates' call? And, in doing so, would Skewes have not told Bolton that it was East who had brought the matter to Yates' attention and that East was, in fact, making a claim for himself?

On the other hand, based on demeanor considerations, I am reluctant to credit the testimony of Michael Stark, East's half-brother and a former employee of Nevarro Mining, that before East was discharged, Nevarro Superintendent Mike Poskas told him that Office Manager Gale Whitt had called Poskas to say that East had filed a grievance. Aside from Stark's demeanor and his relationship to East, I can see no reason for Whitt to have called Poskas to communicate such information. Whitt testimonially denied that she had called Poskas about the grievance prior to the termination and, while her testimony was quite brief, she seemed honest enough.

I am, moreover, led to infer that Bolton knew about the grievance by both the circumstances of the discharge and Bolton's serious prevarications. As I have noted, I will also find that East lied about the asserted basis for his discharge, but that, in my view, is not meaningful in this case.

East was discharged by Bolton on the morning of August 28, allegedly for having been asleep at his Top Gun guard post earlier that night. Bolton testified that he had received complaints about East sleeping on duty (about which more later) and he had in mind to set a trap.

Bolton testified that he had attempted to get together with the two guards about a grievance they had concerning changes in their method of pay, but found that East was not at home on the afternoon of August 27. Figuring that East did not sleep during the day and ''there was no way he could be ready for his next shift,'' Bolton set out to catch him sleeping. Although he normally did not arrive at work until 6 a.m., Bolton, having arranged for Foreman Marcus to be there at 5 a.m. as a witness, came to the minesite about 3:45 a.m. He parked at the bottom of the hill instead of driving up the hill and making noise. He entered the office and allegedly observed East sitting at the desk with his head down on his arms folded on the desk. Bolton sat there for over an hour, smoking, drinking coffee, and watching East. Because it looked as if Marcus might have overslept, about 5 a.m. Bolton took some 28 miners' head lamps from a rack on which they were customarily stored near where East was sit-

ting, and carried them outside. When miners Scott and Shrewsbury arrived shortly before 5 a.m., Bolton told them to ask East where the lights were.

We pause momentarily to consider East's testimony about this episode. He said that he was awake when Bolton arrived around 4 or 4:30 a.m., that he watched Bolton move the miners' lights, that he said nothing to him, and that when Scott and Shrewsbury arrived and asked about the lights, he told them the lights were outside and ''took them to the lights.''

I find it preposterous for East to claim that he saw Bolton enter the office and move the lights, and that he said not a single word to him. Gary Scott was called as a witness by Respondent, and he made an excellent impression on me. Scott contradicted Bolton in several ways. He said that East was ''sitting in a chair with his feet propped up on the desk and his hat was tipped forward.'' He firmly denied Bolton's twice-given testimony that Scott touched East on the arm to wake him. But Scott also testified that when he and Shrewsbury came in, and East acknowledged them, Scott asked where the lights were and East said that ''they were out in the rack'' where they were normally stored. When Scott said that they were not there, East ''looked in the rack and seen they weren't there.'' After East ''looked around for a few seconds,'' he looked outside and walked out to the miner boom to which the lights had been transferred.

Crediting Scott, I conclude that East must in fact have been asleep when he says that he was watching Bolton move the lights. After Scott and Shrewsbury left, Bolton told East that he had observed him sleeping for over an hour and had no choice but to terminate him. East cleaned out his locker, handed Bolton the typed grievance, and left. On September 1, East went back to see Yates and another grievance was drawn up, this one claiming that the discharge was ''a result of me trying to get my classified job back and my proper wage rate as a bargaining unit employee in the union.''

The final factual question is what motivated Bolton to get up so early in the morning to try to catch East asleep. This is where Bolton's testimony runs into trouble, with witness conflicts and inherent improbabilities scattered all over the landscape.

For starters, Bolton and Skewes both testified to the vital importance of the guard being vigilant at all times so that he could respond to any emergencies in the mine. Bolton said that he had told the two guards, East and Gentry, on ''several different occasions'' that they could not sleep on the job during the week,[17] and that the last time he had done so was ''probably a month'' before East's discharge. But Gentry, testifying as Respondent's witness, stated on cross-examination that Bolton had not mentioned the rule to him since he was first hired in January 1991.

More importantly, Bolton first testified that Scott and Shrewsbury had complained to him ''just the one time right before the 28th'' that ''every morning they come in, they was having a hard time to get Mr. East to open the door. They had to beat on the side of the trailer to get him up.'' On cross, however, Bolton testified that the two men had not actually complained to him, but rather to Foreman Marcus. Subsequently, Bolton recanted, saying that the two had talked to him after speaking to Marcus. Marcus was not called to testify nor was his absence explained. Moreover, the credible Scott, who appeared as Respondent's witness, while testifying that he had seen East asleep on the job a ''couple of times,'' said he never told this to any member of management, including Marcus.

Even more significantly, Bolton testified on cross that Scott's and Shrewsbury's complaint had been made to him ''maybe 3 or 4 days'' before the termination and that Marcus had spoken to him around that same time. Despite testimony (such as that given by Skewes) about the heavy responsibility of the guards ''for the lives and safety and welfare of the men underground,'' Bolton testified that he waited the 3 or 4 days after receiving the complaint to try to catch East because ''I had other duties so I bided my time.''

This nonchalant attitude clearly lends support to an inference that Bolton had no real concern about East's reported sleeping on duty until he heard that East had been to see Yates. Indeed, Bolton testified that after Scott and Shrewsbury had allegedly complained to Marcus about East, he spoke to both East and Gentry, saying that ''[T]here has been several complaints about you all's performance on the job.'' If this were true (and I doubt that it was), it would indicate that Bolton was willing to let the matter go with this verbal reprimand—until the call from Yates provoked the early morning excursion.[18]

The record indicates that the failure of a guard to stay awake all night is not considered as catastrophic as Skewes and Bolton made it out to be at the hearing. Bolton testified that, just the day before he testified, Third-Shift Foreman Hagy had told him that he had personally caught East asleep ''a bunch of times,'' but had not said anything about it to Bolton. Because Hagy would have presumably been working in the mine himself, his lack of concern about East's state of alertness suggests that Hagy did not regard sleeping as posing a real danger. In response to a question whether the seriousness of such behavior had not been driven home even to the supervisors, Bolton said that it obviously had not. But with Hagy's own skin potentially at stake, his alleged failure to mention the matter to Bolton implies that it was not deemed a major problem. The reason probably can be found in the testimony of Michael Stark about a mine page phone: ''It'll wake you up.''

Bolton did testify that about a year prior to East's discharge, Bolton had terminated East's brother, Kenny, assertedly then working as a security guard, ''for sleeping.'' There was no further explanation of the circumstances, which may have included repeated offenses, graduated discipline, etc. But Jesse East testified that his brother had been a ''contract employee,'' which seems to indicate that he had not been a regular guard. Two questions on cross-examination of East by counsel for Respondent tend to support this view: ''Did one of your brothers work as a contract laborer at Top Gun?'' and ''He was a contract employee?'' East testified that his brother had worked during the day ''cleaning off the high wall so it wouldn't come down in the coal pile. Then he worked night shift too.''

In addition, East testified without challenge that after his brother's discharge ''they turned around and hired him right

[17] There was usually no mining on weekends.

[18] It may also be noted that on the morning of August 28, Bolton did not arrive at the mine until perhaps 3:30 p.m., or 4 hours after he might have expected East to have fallen asleep—and the miners left unprotected.

back'' at the Nevarro mine. It is true that the testimony of Skewes was that his father, not he, owns Nevarro. The record indicates, however, that the operation of Nevarro was closely tied in to the operation of the other Skewes mines (common bookkeeping and accountant, for example), and also that Skewes/Rustcorp furnished guards to Nevarro. So even if Kenneth East had simply been a guard when he was discharged for sleeping, his prompt reassignment to Nevarro indicates that what Skewes really did was suspend him for a short while.

I conclude that the evidence establishes that the General Counsel has made out a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Although I would agree that union animus, one of the elements frequently referred to as constituting a prima facie case—the others being protected activity, employer knowledge of that activity, and timing—has not been shown here, the General Counsel has proved his case in another way. The evidence compellingly demonstrates that the reason that Bolton stalked East while he dozed peacefully on the morning of August 28, and then discharged him permanently, is related to East's visit to Yates for the purpose of filing a grievance.

Although Respondent's brief only addresses in a footnote the question of whether East was engaged in activity protected by Section 7 of the Act, it is a subject worth examining in more detail. Respondent contends, citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), that in order for East's activities to have been ''concerted'' under Section 7, he must have been ''invoking rights in a collective-bargaining agreement that covered him.'' That statement is not correct. *City Disposal Systems* does involve a situation in which the employee who complained about safety was in fact covered by the agreement in question (although there was an absence of evidence showing that he was aware of a safety provision in the bargaining agreement). The Supreme Court stated, however, that Section 7 of the Act is not confined to a ''narrow meaning,'' id. at 831, and even may protect an employee who ''acts alone.'' Ibid.[19]

This case involves something different from the evidence on which *City Disposal Systems* was decided. Here, an employee did not simply invoke the provisions of a bargaining contract, but he in fact solicited the assistance of a union agent to help him prosecute his grievance. Whether East was correct or not in believing that he was a member of Top Gun's bargaining unit, Union Representative Yates encouraged him to believe that he had a viable grievance under the contract, and it was therefore certainly reasonable for East to have pursued that course. As the *City Disposal* opinion points out, Section 7 provides for a single employee to engage in concerted activities, ibid., by ''joining'' or ''assisting'' a labor organization; so it may be said that seeking aid and support from a labor organization in an effort to secure representation by that organization constitutes ''other concerted activities'' for the purpose of mutual aid or protection.[20]

I thus find that Respondent violated Section 8(a)(1) by discharging East on August 28, 1992. Not only has the General Counsel made out a prima facie case, but Respondent has failed to carry its burden, under *Wright Line*, supra, of demonstrating that it would have permanently discharged East in any event, despite his protected activity. I am not sure that, in a situation in which an employer sets out to trap an employee, an employer is entitled to assert that affirmative defense. But assuming that he would be, in this case the evidence does not show that security guards are permanently fired by Top Gun/Rustcorp for sleeping on the job. In fact, in the case of East's brother, Skewes turned ''right around'' and assigned him to the Nevarro Mine.

Furthermore, because the discharge arose in a union setting and Respondent's motivation is inextricably linked to East's contact with the Union, I also conclude that Respondent violated Section 8(a)(3), as alleged. See *Fairfax Hospital*, 310 NLRB 299 (1993).

CONCLUSIONS OF LAW

1. Top Gun, Inc. and Rustcorp Company constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jesse East on August 28, 1992, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent unlawfully discharged Jesse East on August 28, 1992, I shall recommend that it be ordered to offer him immediate and full reinstatement to his former job, without prejudice to his seniority and other rights and privileges, and to make him whole for any net loss of earnings he may have suffered from August 28, 1992, to the date of Respondent's offer of reinstatement, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[21]

I shall also recommend the issuance of a cease-and-desist order and that Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

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[19] Sec. 7 endows employees with ''the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of . . . other mutual aid or protection.''

[20] The only other possible motivation for Respondent's anger at East was that he told Yates of the two employees who were not paying dues, a matter which Skewes testified was of more concern to him than the fact that East had spoken to Yates. But even that effort by East to remedy what he perceived to be a failure of Respondent to comply with a contract of a bargaining representative which he reasonably believed to be his own would constitute concerted activity. Compare, for example, *Wilson Trophy Co.*, 309 NLRB 610 (1993), in which a nonbargaining unit employee was discharged for contacting a union, which represented the bargaining unit of which her son was a member, to inquire if the union knew anything about a rumored wage disparity contrary to the bargaining agreement.

[21] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

Continued

ORDER

The Respondent, Top Gun, Inc. and Rustcorp Company, a single employer, Elbert, West Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of any activities protected by Section 7 of the Act.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own chosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Jesse East immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any references to the discharge of Jesse East on August 28, 1992, and notify him in writing that this expunction has been made and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of backpay due.

(d) Post at its place of business in Elbert, West Virginia, copies of the attached notice marked ''Appendix.''[23] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee because of any activities protected by the Act.

WE WILL offer Jesse East immediate and full reinstatement to his former job; WE WILL compensate him with interest for any loss of pay he may have suffered because we terminated him; and WE WILL remove from our personnel files any reference to his August 28, 1992 discharge, and notify him of this action and of our intention not to rely on such discharge in future personnel actions.

TOP GUN, INC. AND RUSTCORP COMPANY

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''